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In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES MARTORANO PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was denied his Sixth Amendment right to the effective assistance of counsel because the district court did not advise him of the risks of joint representation.

2. Whether automatic reversal is required where petitioner did not object to joint representation of petitioner and a co-defendant by the same law firm and has failed to show an actual conflict of interest flowing from the joint representation.

3. Whether the First Circuit, which has three active judges, may rehear a case en banc on the vote of two of the three judges.

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OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc (Pet. App. A) is reported at 620 F.2d 912, and the supplemental opinion denying rehearing (Pet. App. B) is not reported. The earlier opinion by a panel of the court of appeals (Pet. App. A) is reported at 610 F.2d 36. The opinion of the district court is reported at 457 F. Supp. 803.

JURISDICTION

The judgment of the court of appeals on rehearing en banc was entered on May 12, 1980, and a petition for rehearing was denied on June 9, 1980. The petition for a writ of certiorari was filed on August 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of making an extortionate loan, in violation of 18 U.S.C. 894(a) (Count I), using extortion to collect a loan, in violation of 18 U.S.C. 892(a) (Count III), and conspiring to commit each of those offenses, in violation of 18 U.S.C. 371 (Counts II and IV). His co-defendant, Brian Halloran, was acquitted on all the charges at the same trial.[1] Petitioner was sentenced to ten years' imprisonment and fined $10,000. The court of appeals affirmed, 557 F.2d 1, and this Court denied a petition for a writ of certiorari, 435 U.S. 922. Thereafter, petitioner moved for a new trial[2] on the ground that the district court had failed to

[1] Prior to trial, two co-defendants, Frank Pagano and James Matera, pleaded guilty to conspiracy to make an extortionate loan (Count I).

[2] Petitioner brought his motion under Fed. R. Crim. P. 33. The district court, however, treated the motion as if it were filed pursuant to 28 U.S.C. 2255. See 457 F. Supp. at 805.

inform him that he had the right to obtain defense counsel not associated with counsel retained by his co-defendant, Brian Halloran. The district court denied the motion, 457 F. Supp. 803, but a divided panel[3] of the court of appeals reversed, 610 F.2d 36 (Pet. App. 36–45). On rehearing en banc, the court of appeals affirmed the judgment of the district court, one judge dissenting (620 F.2d 912; Pet. App. 1–17).[4]

1. Following indictment, petitioner and Halloran retained attorneys Joseph Oteri and Martin Weinberg, members of the same law firm, to represent them. The magistrate first learned of this joint representation when Halloran was arraigned, which was three days after petitioner's arraignment. At this time, the magistrate required both defendants to file letters indicating they were aware of the potential problems involved in joint representation. Later, petitioner came to Weinberg's office, where he was given a chance to read and sign a letter to the magistrate acknowledging the "risks and dangers" of joint representation and waiving his right to separate counsel (R. 253, 277–278, 299, 301–302).[5] The letter was signed and filed in court (R. 299).

2. The principal witness against petitioner at trial was Peter Pallotta, the victim of the extortion scheme. He testified that petitioner loaned him $2,000 at 5% interest per week (I Tr. 10–13) and that Halloran collected approximately $400 in late loan repayments from him at gunpoint

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[3] Circuit Judge Bownes and District Judge Pettine were in the majority; Chief Judge Coffin dissented.

[4] On rehearing en banc, Chief Judge Coffin and Circuit Judge Campbell were in the majority; Circuit Judge Bownes dissented.

[5] "R." refers to the Record on appeal. The letter to the magistrate and a letter from attorney Oteri to petitioner are reproduced in the original panel opinion (Pet. App. 40 n.2).

(I Tr. 41–43).[6] Pallotta also recorded some highly incriminating telephone conversations with petitioner, which were admitted into evidence (Pet. App. 43 & n.7).

Petitioner, on the other hand, testified that he had actually made the loan to Peter Pallotta's brother, Louis Pallotta, that the loan carried no interest, and that it had been repaid well before the time Peter Pallotta claimed Halloran took the money at gunpoint (III Tr. 15–16). Neither Halloran nor Louis Pallotta testified for the defense.

3. a. After petitioner's conviction had been affirmed on direct appeal, he filed a motion in the district court seeking a new trial. In that motion, petitioner claimed that he had been denied the effective assistance of counsel at his trial because he and Halloran were represented by members of the same law firm and because the court had not made an inquiry on the record about joint representation, as required by the First Circuit's decision in *United States* v. *Foster*, 469 F.2d 1 (1972). Petitioner also alleged that his attorney did not call Louis Pallotta as a witness because he was afraid that Pallotta's testimony might be harmful to Halloran and that the decision to have petitioner, but not Halloran, testify resulted from a conflict of interest.

The district court heard testimony from petitioner and from attorneys Oteri and Weinberg. After doing so, the court found the record "clear" that both attorneys, "in an objective evaluation of the possible impact of Louis Pallotta's testimony felt that he would be a liability to both [petitioner] and Halloran and could be of no assistance whatsoever to either of them" (457 F. Supp. 809). This

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[6] Pallotta testified that when Halloran took the money he stated, "He [petitioner] told me to come here and get money and I'm not leaving until I've got it" (I Tr. 269).

evaluation was based on the fact that Louis Pallotta had given a statement to the FBI that conflicted with the testimony he would have given at trial; on his "lengthy psychiatric history," which, when brought out on cross-examination, "would severely damage, if not destroy" his value as a defense witness; and on a "dry run" of his testimony in which the attorneys' associate decided that Pallotta would be a "horrible witness" (*ibid.*). The court also analyzed the other assertions of a conflict of interest and concluded (*id.* at 810):

> There is simply no evidence before me from which to conclude that the decision to put [petitioner] on the witness stand and the decision to keep Halloran off, or the decision not to call Louis Pallotta as a witness for the defense, resulted from a conflict of interest between [petitioner] and Halloran. The record contains nothing from which it can be inferred that prejudice existed from joint representation.

The court also found (*id.* at 806–807) that petitioner read the waiver letter before signing it, and the court concluded that he had accordingly waived his right to separate counsel.

b. On appeal, the panel majority found that petitioner had not waived his right to be represented by separate counsel.[7] Because the district court did not advise petitioner about the risks of joint representation, the panel reasoned (Pet. App. 41–42) that under the First Circuit's decision in *United States* v. *Foster*, *supra*, the government bore the burden of establishing the unlikelihood

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[7] The panel noted (Pet. App. 40–41) that the letter petitioner signed stated that he was "aware" of "risks" of joint representation but did not mention what those risks were in this case. The panel also observed (*ibid.*) that petitioner and the attorneys had testified that they did not discuss the contents of the letter, that counsel viewed the letter as a "technicality," and that petitioner accordingly felt no need to satisfy himself of the meaning of the letters. The district court, however, had not found this testimony credible (457 F. Supp. at 806).

of prejudice arising from the joint representation. Finding that the government had not met this burden with respect to counsel's decision not to call Louis Pallotta to testify, the panel concluded that the conviction should be set aside.[8]

c. On rehearing en banc, however, the court of appeals affirmed the district court's denial of collateral relief. The court applied the rule announced in *United States* v. *Foster*. See Pet. App. 4. In that decision the First Circuit held, in the exercise of its supervisory powers, that the district courts in the circuit must "warn on the record every defendant who indicates that he contemplates being jointly represented at trial of the risks inherent in such representation, so that the court can be assured that his waiver of the right to separate counsel is knowing and voluntary" (*id.* at 2). The court of appeals en banc agreed with the panel that because the district court failed to comply with the *Foster* decision, the government bore "the burden of proving the unlikelihood of any prejudice arising from joint representation" (*id.* at 4). But the court concluded that the government had satisifed its burden here in establishing that the failure to call Louis Pallotta and the decision to have petitioner (but not Halloran) take the stand were not occasioned by a potential conflict of interest.

With respect to the first assertion of a conflict, the court noted the district court's finding that Louis Pallotta had "overwhelming disabilities as a defense witness" (Pet App. 6). Nonetheless, the court assumed for purposes of argument that calling him was a "conceivable alternative strategy" (*id.* at 7). Reaching the conflict issue, then, the court concluded that separate attorneys would have made the same choice and that the decision not to call Louis

[8] The panel did not address petitioner's other assertions of a conflict of interest.

Pallotta therefore was not the result of a potential conflict of interest.

On the one hand, the court reasoned, if Louis Pallotta had corroborated petitioner's testimony that the loan was made to Louis rather than Peter Pallotta and that it had been repaid prior to Halloran's alleged attempts to collect, this testimony would have exculpated both Halloran and petitioner. On the other hand, if Louis Pallotta's testimony had been discredited on cross-examination, petitioner's testimony would necessarily also have been discredited, and both defendants would have suffered equally. Moreover, the court concluded that if Louis Pallotta had testified that Halloran was an enforcer for loansharking activities, petitioner's reputation would have been damaged as much as Halloran's, because the two were shown to be close associates. In sum, the court concluded that "whatever considerations induced the attorneys not to call Louis cut across both clients' cases" (Pet. App. 8).

The en banc court also rejected petitioner's other two assertions of a conflict of interest. It agreed with the panel that "the decision to have [petitioner] testify on his own behalf was compelled by the strength of the government's taperecorded evidence against him" and was, at all events, no more damaging to petitioner than to Halloran (Pet. App. 11). And the court concluded that calling Halloran "plainly was not a viable alternative" because "[e]ven had [petitioner] been represented by separate counsel, he could not have compelled Halloran to forego his fifth amendment right not to testify if Halloran's interests dictated that he remain silent" (*ibid.*).

d. In a memorandum denying petitioner's petition for further rehearing (Pet. App. B), the en banc court noted that it had evaluated the record under a standard that was in some respects more favorable than that enunciated by

this Court in *Cuyler* v. *Sullivan*, No. 78-1832 (May 12, 1980),[9] and still had reached the conclusion that there were no adverse effects of joint representation.

ARGUMENT

1. Petitioner's arguments regarding the duty of a trial court to inquire about a possible conflict of interest and the burden of proof respecting a possible Sixth Amendment violation are foreclosed by this Court's decision in *Cuyler* v. *Sullivan*, *supra*.

a. Petitioner first urges (Pet. 11-19) that his conviction should be reversed because the district court failed to enumerate on the record the risks of joint representation. However, in *Cuyler* v. *Sullivan*, *supra*, the Court held that "[u]nless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry" into the propriety of multiple representation. Slip op. 11. Petitioner has pointed to no factors that required an inquiry by the district court in this case. The Court noted in *Cuyler* that some federal courts of appeals, including the First Circuit, had invoked their supervisory powers to require an inquiry in all instances of joint representation, but that others had not. See *id.* at 10 n.10, and cases cited therein.[10] No issue with respect to exercise of the courts' supervisory powers in this regard warrants review at the present time, however, because proposed Rule 44(c), Fed. R. Crim. P., which is scheduled

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[9] The decision in *Cuyler* v. *Sullivan* was announced on the same day as the en banc court's decision in this case.

[10] Contrary to petitioner's contention (Pet. 15), the Court did not "hint" in *Cuyler* (slip op. 10 n.10) that federal district courts have a constitutional duty to inquire about possible conflicts in all cases of joint representation. The Court simply noted a conflict in the circuits on the question—a conflict that was eliminated by the decision in *Cuyler* itself.

to go into effect on December 1, 1980, will establish a uniform national rule respecting the trial courts' obligations.

b. Petitioner also contends that whenever multiple representation has occurred, "the government [must] establish that the defendant knowingly and intelligently waived his right to separate representation" (Pet. 20). Petitioner is plainly in error. The Sixth Amendment secures a right to effective assistance of counsel—not a right, as such, to separate counsel.[11] Accordingly, "multiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest." *Cuyler* v. *Sullivan*, *supra*, slip op. 12; *Holloway* v. *Arkansas*, 435 U.S. 475, 483–484 (1978). Thus, the question of waiver arises only if a reviewing court should determine, after trial, that the defendant was denied the effective assistance of counsel because of a conflict of interest resulting from multiple representation. In the present case, the court of appeals correctly held that defense strategy was not infected with a conflict of interest and that petitioner was not denied the effective assistance of counsel. Therefore no question of waiver arises.

c. Petitioner argues (Pet. 23–32) that the district court's failure to inquire whether he understood the risks of joint representation shifts to the government the burden of proving that joint representation did not result in a Sixth Amendment violation. This Court, however, took a contrary view in *Cuyler*, stating that "[i]n order to establish a violation of the Sixth Amendment, a *defendant* who raised no objection at trial *must demonstrate* that an actual con-

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[11] Of course, requiring separate counsel is, in our view, a sound prophylactic measure to prevent even the possibility that ineffective assistance of counsel will result from joint representation. See *Cuyler* v. *Sullivan*, *supra*, slip op. 11 n.11, and authorities cited. But there is a considerable difference between what constitutes prudent practice prior to trial and what justifies setting aside a conviction.

flict of interest adversely affected his lawyer's performance" (slip op. 13; emphasis added).

In any event, the court of appeals reviewed the facts of this case under a standard more favorable to petitioner than *Cuyler* requires, because it placed on the government the burden of proving the unlikelihood of any prejudice arising from joint representation (Pet. App. 4; Pet. App. B).[12] Even under this test, the court of appeals, after its thorough review of the record, agreed with the district court that "there were no adverse effects as a result of joint representation" (Pet. App. B). See pages 5–7, *supra*. This factual issue, on which both courts below concurred, does not warrant review by this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635–636 (1967).

2. Petitioner's challenge (Pet. 32–38) to the authority of the court of appeals to rehear his appeal en banc is frivolous. Rule 35(a) of the Federal Rules of Appellate Procedure states that "[a] majority of the circuit judges who are in regular active service may order that an appeal * * * be * * * reheard by the court of appeals in banc." See also 28 U.S.C. 46(c). The First Circuit currently has and had at the time of petitioner's appeal three circuit judges in regular active service, although it is authorized to have four. Of those three, two judges voted for rehearing en banc. Clearly, then, the rehearing was ordered by a majority of

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[12] Although the court of appeals described the issue as whether there was "prejudice arising from joint representation" (Pet. App. 4), it is clear that the court used the term "prejudice" to refer to a conflict of interest that affected defense strategy (*id.* at 5–6). Thus, except for allocation of the burden of proof, the First Circuit's analysis was essentially in accord with the Court's holding in *Cuyler* (slip op. 14) that the defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. Under *Cuyler*, the defendant need not go further and demonstrate "prejudice" in terms of the impact the affected strategy may have had on the trier of facts (*ibid.*), and the court of appeals did not so hold.

the court. Compare *Zahn* v. *International Paper Co.*, 469 F.2d 1033 (2d Cir. 1972), aff'd, 414 U.S. 291 (1973),where en banc review was denied because it was supported by only four of the eight judges in regular active service on the Second Circuit. Petitioner also argues that en banc review was inappropriate because there was no intra-circuit conflict on the Sixth Amendment questions presented in this case. But Chief Judge Coffin, in his opinion dissenting from the panel's decision, viewed the majority opinion as a departure from the First Circuit's decisions in *United States* v. *Foster* and *United States* v. *Donahue*, 560 F.2d 1039 (1977), and Judge Campbell apparently agreed with him and voted to rehear the case en banc. In any event, no rule or statute limits rehearing en banc to those cases that present an intra-circuit conflict. Indeed, the decision as to which cases deserve rehearing by the entire court is one that is properly left to the discretion of the circuit judges. *Western Pacific Railroad Corp.* v. *Western Pacific R.R.*, 345 U.S. 247, 259 (1953). Here, the majority of the court considered this case sufficiently important to warrant en banc review. There is no basis for overturning this discretionary decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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